UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION H-07-784**
	§	
THE ABANDONED VESSEL,	§	
In rem	§	
Defendant.	§	

NATHAN SMITH'S RESPONSE TO INTERVENOR SORENSON'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT:

COMES NOW, Plaintiff, Nathan Smith, ("Smith") and file this Response to Intervenor Sorenson's ("Sorenson's") Motion to Dismiss. Smith would respectfully show this Court as follows:

I. INTRODUCTION

1. Intervenor, Sorenson, has asked this Court to dismiss this case for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because the complaint does not allege the subject vessel is in navigable waters, and this must be pleaded to support admiralty jurisdiction. *See Docket Entry No. 21.* Sorenson's motion should be denied because Smith has specifically pled that this Court has admiralty and maritime jurisdiction, Smith has pled a salvage claim *in rem*, which is an admiralty and maritime claim, and it is not necessary to plead "navigability." Alternatively, Smith seeks leave to amend to plead the vessel is in navigable waters, if deemed necessary by the Court, and Smith has provided a Declaration establishing navigability.

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II.
STANDARD OF REVIEW

2. Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint for lack of subject-matter jurisdiction. *See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 351 (5th Cir.2003). A court may find a lack of subject-matter jurisdiction based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F .3d 158, 161 (5th Cir.2001). The party asserting jurisdiction bears the burden of proof on a Rule 12(b)(1) motion to dismiss and must show that jurisdiction exists. *Id.* at 161.

3. Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint based upon a failure to state a claim upon which relief may be granted. "A motion to dismiss under rule 12(b)(6) 'is viewed with disfavor and is rarely granted.'" A motion to dismiss for failure to state a claim "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir. 1997) (quoting *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir.1982)). "A motion to dismiss an action for failure to state a claim admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts." *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995). The complaint must be liberally construed, drawing all reasonable inferences in favorable of the plaintiff. *Woodard v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005). "The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim." *Id.* (citing *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401 (5th Cir.1996). An action cannot be dismissed unless it appears beyond doubt that the plaintiffs

would not be entitled to recover under any set of facts that they could prove in support of their claim. *Crowe*, 43 F.3d at 203.

III.
SMITH HAS PLED FACTS SUFFICIENT TO GRANT THIS COURT SUBJECT MATTER JURISDICTION

4. Sorenson contends in her motion that Smith purports to bring an action under this Court's admiralty and maritime jurisdiction, but fails to state that the alleged vessel is located in, on, or under a navigable water way. *Intervenor Sorenson's Motion to Dismiss at ¶4, See Docket Entry No. 21.* Clearly, Sorenson admits Smith has pleaded this is a case within the admiralty and maritime jurisdiction of the Court. Although navigability is not mentioned in Smith's Original Complaint, the suit was filed *in rem* under the admiralty and maritime jurisdiction of the Court within the meaning of Federal Rules of Civil Procedure 9(h) and the Supplemental Rules for Certain Admiralty and Maritime Claims and in particular Rules C and D. *Complaint at ¶ 11, See Docket Entry No. 1.* An *in rem* action for salvage award against artifacts recovered from the remains of a centuries-old shipwreck states a claim within the federal district court's admiralty jurisdiction. *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186 (S.D. Fl. 1981) (*in rem* action holding Florida law governing salvage operations was preempted because state law conflicted with federal maritime salvage laws established by long tradition of cases arising under federal admiralty and maritime jurisdiction) citing *Platoro Ltd. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1055 (5th Cir.1980) (holding that "a party claiming an award for the salvage of a vessel abandoned at sea could properly proceed under the court's admiralty jurisdiction.").

5. Salvage claims are only available in admiralty. *See Platoro Ltd. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 899, n.5 (5th Cir.1983). "An *in rem* suit against a vessel is,

we have said, distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 446-47 (1994).

6. The district court in admiralty has exclusive jurisdiction over all questions as to salvage services to vessels afloat or wrecked on the high seas or the public navigable waters of the United States, and to property being transported on such vessels. *The North Carolina*, 40 U.S. 40, 48 (1841) ("The points in controversy are, whether salvage is due, and if due, how much? Upon such questions, there can be no doubt of the jurisdiction of a court of admiralty; nor of its authority to proceed *in rem*, and attach the property detained. The admiralty is the only court where such a question can be tried; for what other court, but a court of admiralty, has jurisdiction to try a question of salvage?").

7. Smith's Complaint asserts that Smith's excavation and exploration services which successfully located the abandoned vessel constitute services of the highest merit justifying a full and liberal salvage award. *Complaint at ¶9, See Docket Entry No. 1.* The Complaint asserts, in the alternative, that this is a claim for title to the abandoned vessel, including her tackle, armament, apparels, and cargo, pursuant to the law of finds. *Complaint at ¶8, See Docket Entry No. 1.*

8. Therefore, Smith has asserted a maritime claim. Sorenson has cited no case that says Smith must plead the vessel is in navigable waters, and Smith found no case requiring such a pleading. Smith is not required to specifically allege that the abandoned vessel is found in navigable waters in order for this case to be maintained under the admiralty jurisdiction of this Court. However, Smith could make such an allegation, if necessary, and seeks leave to amend his complaint, if the Court so determines.

9. Sorenson's Motion to Dismiss cites *Agip Petrol. Co., Inc. v. Gulf Island Fab., Inc.*, for the proposition that for admiralty jurisdiction and maritime law to apply, "the case must be substantially related to maritime trade – including support activities like salvage – in addition to its location on navigable waters." 17 F.Supp.2d 658, 659 (S.D. Tex. 1998). *Agip* is easily distinguished. *Agip* involved choice of law in a maritime contract. The tests for admiralty jurisdiction in maritime torts or contracts cases do not apply in a salvage case. This was the conclusion of the court in *Historic Aircraft Recovery Corp. v. Wrecked and Abandoned Voight F4U-1 Corsair Aircraft*, relied upon by Sorenson. 294 F.Supp.2d 132, 137 (D. Me.2003) (holding that the test developed for admiralty jurisdiction over torts is not the determinate test for admiralty jurisdiction over salvage claims); *see also Sirius Ins. Co. (UK) Ltd. v. Collins,* 16 F.3d 34, 36 (2d Cir. 1994) (holding the test for admiralty jurisdiction over maritime contracts as permitting admiralty jurisdiction over "contracts whose nonmaritime elements are 'incidental' to a primarily maritime purpose, as well as the separable maritime portions of mixed contracts that are not primarily maritime, if these can be separately litigated without prejudice.").

10. In *Historic Aircraft*, the court made the distinction between salvage claims and tort claims when determining admiralty and maritime jurisdiction. *Historic Aircraft*, 294 F.Supp.2d at 137. The court created a test that it believed could be used to determine "the logical outer limit on admiralty jurisdiction over salvage claims." *Historic Aircraft*, 294 F.Supp.2d at 137. In considering admiralty jurisdiction over salvage claims, that court considered (1) the location of the waterway and (2) the item that is the subject of the proposed salvage. *Historic Aircraft*, 294 F.Supp.2d at 137. The court found that the waterway was not navigable and therefore did not address the second part involving the subject of the proposed salvage. *Historic Aircraft*, 294 F.Supp.2d at 137.

11. The court in *Historic Aircraft* went further than it had to in order to decide the issue of admiralty jurisdiction in that case. The issue before the court was navigability, which has long been the test as set forth in the cases cited by the court. *Historic Aircraft*, 294 F.Supp.2d at 137; citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) (outlining test for admiralty jurisdiction in maritime tort cases); *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 & n.7 (1979) (noting that past cases have defined navigability for purposes of defining the limits of admiralty jurisdiction); *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 774 (9th Cir.1995) (explaining that admiralty jurisdiction generally "requires a connection to navigable waters."). Based on extrinsic evidence, the court concluded the water at issue was not navigable. *Historic Aircraft*, 294 F.Supp.2d at 139.

12. The water at issue in this case is navigable. The court has authority to consider evidence beyond the complaint in ruling on motion to dismiss for lack of subject matter jurisdiction. *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 161 F.3d 314, 319 (5th Cir.1998), adopting *In re Arbitration Between Trans Chem. Ltd. & China Nat'l Mach. Import & Export Corp.*, 978 F.Supp. 266, 274 (S.D.Tex.1997). This allows the court to devise procedure that may include permitting affidavits, allowing further discovery, hearing oral testimony, and conducting evidentiary hearing, all limited to deciding jurisdictional issue. *Trans Chem.*, 161 F. 3d at 319. The attached declaration of Plaintiff, Nathan Smith, establishes navigability. *See Declaration of Nathan Smith in Support of Smith's Response to Sorenson's Motion to Dismiss, Exhibit A.* Smith's declaration shows that the vessel is under water. *See Declaration of Nathan Smith at ¶ 3, Exhibit A.* Smith's declaration further shows that he had been to the vessel by boat and that a person could travel from the vessel location to the Mission

River, from the Mission River to the Gulf of Mexico and intracoastal waterways, and from there to other states in the United States. *See Declaration of Nathan Smith at ¶ 4, Exhibit A.*

IV.
SMITH HAS SUFFICIENTLY PUT FORTH A CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

13. Sorenson alleges that Smith's claims for declaratory and injunctive relief should be dismissed because the case is not within the Court's admiralty or maritime jurisdiction. *Sorenson's Motion to Dismiss at ¶8, See Docket Entry No. 21.* This argument is without merit given that Smith's claims against the abandoned vessel fall squarely within the maritime jurisdiction of this Court.

V.
CONCLUSION

14. Smith has established subject matter jurisdiction because he has alleged maritime jurisdiction and a salvage claim *in rem*. Alternatively, leave should be granted to plead that the abandoned vessel is in navigable waters and Smith has provided a declaration establishing navigability. Smith requests the Court deny Intervenor Sorenson's Motion to Dismiss or, in the alternative, grant Smith leave to amend the complaint, and for such other and available relief as may be appropriate.

Respectfully submitted,

SCHWARTZ, JUNELL, GREENBERG & OATHOUT, L.L.P.

/s/ Richard A. Schwartz
Richard A. Schwartz
State Bar No. 17869450/ Fed. Bar No. 3647
909 Fannin, Suite 2000
Houston, Texas 77010
Telephone No. (713) 752-0017
Telecopier No. (713) 752-0327

Attorneys for Plaintiff, Nathan Smith

CERTIFICATE OF SERVICE

I certify that on the 21st day of November 2007, a true and correct copy of the foregoing ***Response to Intervenor Sorenson's Motion to Dismiss*** was served on the counsel by facsimile and first class U.S. mail.

Ronald B. Walker
Terry M. Carroll, Jr.
Walker, Keeling & Carroll, L.L.P.
210 E. Constitution
P.O. Box 108
Victoria, Texas 77902-0108

Attorneys for Intervenor

/s/ Richard A. Schwartz